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Abstract

This paper uses the sociology of the case and the legal sociology of Donald Black to examine the litigation over public school financing inequality. Initial examination is made of the United States Supreme Court decision in *San Antonio Independent School District v. Rodriguez* and the Oklahoma Supreme Court decision in *Fair School Finance Council of Oklahoma v. State of Oklahoma* from a technical legal core perspective and a critical lens. Other cases are discussed along with other information to allow the reader a "big picture" of the issues and policies involved in the intersection of race, wealth, law, education, and sociology. Black's legal sociology then provides a framework for a discussion of cases in a social context rather than a traditional jurisprudential model. Finally, a legal reform suggested by Black allows for the hypothecation of case resolution that further constitutional ordering and social justice.

Introduction

What the United States Supreme Court could have said in Brown v. Board of Education:

> The Equal Protection Clause does not require absolute equality or precisely equal advantages. The plaintiffs here do not claim that the children in black schools are receiving no public education, but rather that they enjoy fewer educational opportunities than those available to children in white schools. Education is not a fundamental right since it is not mentioned and protected as such in the federal constitution. This is especially true where no charge could be made that the system fails to provide each child with an opportunity to acquire at least the basic minimal skills. The area of education presents a myriad of intractable economic, social and even philosophical problems. It is better to defer to the legislature's wisdom. Local control promotes responsibility, initiative, and flexibility. Therefore, little Linda Brown is entitled only to a basic education and equal protection of the laws is not violated by mere separateness or proven actual inequality.

This statement is shocking to read fifty years after the Supreme Court held that separate is inherently unequal in *Brown v. Board of Education* (1954). Yet the above statement summarizes the arguments of courts, including the United States Supreme Court, in cases involving equal opportunity challenges based upon inequitable financing of public schools (*Fair School Finance Council of Oklahoma v. State of Oklahoma*, 1987; *San Antonio Independent School District v. Rodriguez*, 1973; hereafter *Rodriguez*). In the above paragraph, substitute poor for black and wealthy for white.

U.S. Supreme Court: Wealth or Race

Technical legal analysis asserts that *Brown* involved race while *Rodriguez* merely involved wealth. The reason this distinction is important has to do with the test applied by the courts to determine if state action has violated equal protection. Strict judicial scrutiny applies when a suspect class or fundamental right is involved. Race is considered a suspect class. A rational basis test is applied when state action does not implicate a suspect class or fundamental right. This latter test only requires that a state action furthers some legitimate articulated state purpose. Education is not mentioned in the United States Constitution. The U.S. Supreme Court thus reasoned that education was not a fundamental right. This in spite of the statement in *Brown* that education is so important that "where the state has undertaken to provide it, is a right which must be made available to all on equal terms". In addition, wealth was not considered a suspect class. The Court reasoned that the "poor" could not be identified or defined and that relative deprivation is different than absolute deprivation. It seems as long as children have the opportunity for schooling which offers "basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" then no equal protection violation has occurred. This left the Court only to determine whether the Texas school financing system was rationally related to some legitimate purpose. This is where two American values come into play. The Court found while Texas was "assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level". Thus, the State of Texas and the school districts were not violating the rights of students in the poor districts. The Edgewood district had $248 dollars from state and local funds per student. The Alamo Heights district had $558 per student from state and local funds. Edgewood was 96% Mexican-American and Black. Alamo Heights was 81% white.

New Judicial Federalism

Shift to State Courts

Litigation shifted to the state courts with the U.S. Supreme Court's foreclosing of school financial inequality cases in *Rodriguez*. School finance cases were an early participant in what has been described as the "new judicial federalism". Litigation shifted to state high courts interpreting state constitutions. The theory of higher law constitutionalism was advanced such that state constitutions would be seen as fundamental expressions of the powers of state government and the rights of citizens that should stand above mere legislative statutory provisions. More than a few state high courts had concerns with such a theory (Reed, 2001, pp. 88-89).

Oklahoma Example

Oklahoma's Supreme Court decided in 1987 that Oklahoma's school financing system did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or various provisions of the state constitution which required " a system of public schools, which shall be open to all the children of the state" and "The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated" (*Fair School Finance Council of Oklahoma v. State of Oklahoma*, 1138, 1151; hereafter *Fair School*). Interestingly, the Court decided the case even though the plaintiffs' argued for remand since changes had been made to state financing and evidence was needed. However, a conservative court can be activist when it desires to make policy (Kairys, 1998, p. 8). One should note that Oklahoma does not authorize state court advisory opinions which some states allow. No evidence was ever heard. Both the district court and the Oklahoma Supreme Court rendered their decisions on the pleadings which is a determination of whether the facts alleged state a cause of action. The Court found that Oklahoma is like most states. Financing comes from three main sources: local, state, and federal. Federal is a small part of available funds. State funds have increased over the years, but most funds were still raised locally on property values. The Court admitted that this local source of funds was the reason for funding disparities. The poor districts could not match the wealthier ones even when they taxed themselves more and to the state limits. One challenge involved the variability in assessment of property taxes. The Court made clear that prior decisions required taxpayer equality and uniformity. It is interesting that the state's children are not entitled to the same equality. *Rodriguez* was cited as authority for denying the federal equal protection claim. The plaintiffs were never allowed to present evidence which might have raised facts that make *Rodriguez* inapplicable such as the issue left open in *Rodriguez* concerning state limits on maximum taxation available locally. Unlike Texas, many of the Oklahoma plaintiffs were taxing to the maximum, but still below the affluent districts. The Court ruled that since the plaintiff did not allege that

any child was not receiving an adequate education, the U.S. equal protection claim failed.

The Oklahoma Supreme Court then considered challenges based upon the state constitution. At issue was whether the state constitution provided equal protection against disparate school funding. The Court found that Oklahoma's due process protection encompasses equal protection and , despite the fact that a state supreme court can interpret a state constitution without regard to the U.S. Supreme Court's interpretation of a similar provision in the national constitution, the Oklahoma provision was deemed coextensive with the federal provisions. Of course, unlike the national constitution, the Oklahoma Constitution deals extensively with education. Thus, the Court had to deal with whether the "mere mention of a subject" in the state constitution creates a fundamental right (*Fair School*, 1148). The Court noted that state constitutions differ from the federal. State constitutions contain much that could have been left to statutes. This is especially true of Oklahoma's long, populist inspired constitution which also made the legislature the strongest branch of government. As such, not everything mentioned therein is a fundamental right. All the Oklahoma constitution requires is "a basic, adequate education according to the standards that may be established by the State Board of Education" such that they will be "useful citizens" (*Fair School*, 1149). The standard of review is not strict scrutiny, but only whether the legislature acted within its powers and there is a rational basis for any classification (*Fair School*, 1150). The rational basis for Oklahoma's school financing scheme contains the familiar "to strengthen and encourage local responsibility for control of public education, with the maximum public autonomy and responsibility remaining at the local level". In addition state aid to all districts regardless of wealth was seen as "developing a sense of broader responsibility and permitting the exercise of local initiative through flexible taxation" (*Fair School*, 1146). This seems to indicate that wealthy districts need state aid to give wealthy citizens a tax break. It is interesting that in determining legislative intent, the Court ignored the language of a statute cited by it that said the legislative intent was "to provide the best possible educational opportunities for every child in Oklahoma" (*Fair School*, 1146). Of course, an activist conservative court hell-bent on making policy ignores what doesn't fit in their reality. The statutory language seems to require more than a minimally adequate education for citizenship.

The dissent by Justice Simms points out that Oklahoma was the only state to uphold a financing scheme without allowing the plaintiffs a trial. He boldly argued that states are responsible for education in our system of government and that states create and allow local governance, but that it is and remains a state responsibility to educate all of the children (*Fair School*, 1152-3). Justice Alma Wilson stated that the state constitution may not require absolute equality in school finance but does require fairness. She noted that the disparity grows every year as those school districts with the most legislative clout perpetuate such financing devices as "hold harmless" formulas which guarantee the rich get richer with state aid (*Fair School*, 1153-4).

Justice Wilson points out the failure of democratic institutions and the need for the Oklahoma Supreme Court to stand for those unable to get voice in the legislature. She recognized the geopolitics of public education. The state legislatures are the site of struggles over school financial equity. Their districts are geographically defined. It would be politically exceptional to find a legislator that would vote for less aid for his home district or even greater aid for neighboring districts while his district stayed the same. Those districts with higher socioeconomic citizens have more political capital to spend on an issue close to their hearts-the education of *their* children and local control (Reed, 2001, 134-5). The courts can act as representational proxy for those whose interests are systematically excluded by the geopolitics of education (Reed, 171). School finance cases, like voting district reapportionment cases, end up in court largely because of democratic processes are structurally unable to address inequality (Reed, 82). Change is not likely without pressure from the courts (McDermott, 1999, 154).

Technical Summary

What this article has discussed so far is the technical legal analysis used by the courts to dismiss school finance equality claims. The summary of these technical arguments is that education is not a fundamental right. The poor are not a suspect classification like race or at least not identifiable. Therefore the courts employ only a rational basis test to ask whether the scheme of school finance is rationally related to a legislative stated purpose which minimally is to provide a basic education to all children. Local control is a vital value and virtue. Actual inequality does not violate equal protection of the law.

States Scorecard

Before moving on to an analysis of the case outside and beyond the strict legal arguments, we need to make clear that forty-three states have state court decisions concerning education finance. Only five states have not had a case filed. Twenty-five states have issued opinions favorable to the plaintiffs challenging the system. Eighteen states have issued opinions in favor of the state system (Advocacy Center for Children's Educational Success with Standards, 2004, hereafter ACCESS). Forty-nine of fifty state constitutions have an education clause of some kind. This is important to understand in light of a key phrase from *Brown v. Board of Education* that educational opportunity is a right which must be made available on equal terms "where the state has undertaken to provide it" (Reed, 2001, 55). Reed suggests that state supreme court rulings that strike down existing school finance schemes fall into two broad categories: equity or adequacy. Equity decisions rely on equal protection clauses in state constitutions. Since many states interpret their constitutional provisions as coextensive with the federal constitution, *Rodriguez* limits this claim in such states. Adequacy claims examine the state educational clauses closely. Some simply create a system of public education, some declare education of fundamental

importance, and some take a middle ground requiring a "thorough and efficient" public education system. The two concepts are often mingled and interrelate. For instance, a system may be deemed inadequate or inefficient because it produces inequality. Also, as with Justice Wilson above, adequacy may be defined as fairness such that absolute dollar for dollar equality may not be required but a rough parity. Of course, adequacy can simply mean that the schools teach basic skills. Judges love to mingle ideas and arguments in order to make good rhetoric. (Reed 10-14)

Intersection of Class and Race

Our strict legal analysis of *Rodrigu*ez, a United States Supreme Court case, and *Fair Sch*ool, a representative state case denying remedy, leads to different principles and conclusions depending on whether we classify a case as racial or wealth/financial. What if the two intersect? In *Sheff v. O'Neill* (1996), the plaintiff argued that race and class can not be isolated one from the other and that courts must consider a more holistic view. Of course, the trial court felt compelled to separate race and poverty and rule against the plaintiff. The trial court felt that the state hadn't created the problem by creating districts in 1909. The plaintiff argued that districts drawn along municipal lines reinforced the racial and class inequities. The Connecticut Supreme Court ruled 4 to 3 for the plaintiff, but essentially took the economic isolation argument off the table and recast the issue as mostly racial. The remedy lies across district lines which the state supreme court declared as creating the problem. (Reed, 2001, 168-170; McDermott, 1999, 1-2) The federal courts ended this issue in the federal courts with *Milliken v. Bradley* (1974) when it refused to order interdistrict busing in Detroit.

Sociological Law and Justice

Beyond the Technical Core of the Case

So far this paper has discussed one part of the constitutional ordering process proposed by Reed: judicial interpretation and articulation of texts. Reed argues that constitutional ordering is not strictly text bound and not entirely encompassed in constitutions (2001, 64, 123). Sociologist Donald Black would call this text bound analysis the technical core of the case. Such core would determine the outcome of the case only if all other things, including the social characteristics of all concerned, were equal. The traditional model of law, the jurisprudential model, focuses on rules and applies a universal logic with a practical decision as a goal. The sociological model of law focuses on social structure, the variableness of behavior, is scientific and seeks to explain. While the jurisprudential model sees discrimination as exceptional, the sociological model assumes social characteristics are always reflected in the law. The kinds of discrimination are expanded from the normal race, class, and gender types to include degree of intimacy, cultural distance, degrees of organization, interdependence, integration, and respectability. (Black, 1993, 21-23) Law behaves and varies across time and space. As such it can be predicted and quantified and

explained scientifically. The scientific theory of law contains propositions that can be tested scientifically. (Black, 1976, 3, 6) This paper now explores some of these propositions in the context of challenges to school finance schemes.

Propositions of Science of Law

The Other

Law decreases when people live in entirely different worlds. (Black, 1976, 41) White flight that began in the 1950's and 1960's accelerated with forced busing orders and the protection offered by *Milliken v. Bradley* (Reed, 2001, 3). *Milliken* stands for the proposition. The Supreme Court did not apply law to the different worlds of suburbia and urban centers in 1974. Suburbs escaped law which would have required them to be part of regional desegregation. "Chocolate cities and vanilla suburbs" referred to the increasing racial homogenization in the cities and suburbs of the United States (Reed, 3 citing Farley et. al, 1978). In the New Haven metropolitan area about 3 out of four black residents live within the city and three out of four white residents live in the suburbs. One-third of children in New Haven live below poverty, but only 5% of children in the suburbs do. Poverty is viewed as an "urban" problem. When suburbs do encounter poverty it is seen as contagion from New Haven. One state representative stated that a myth shapes Connecticut politics and that myth is that "Somebody else has the problems. The problems are over there. Just keep things separate. That way we can protect ourselves." (McDermott, 1991, 28) The mayor of a suburban city remarked that the increase in Black and Hispanic population in his city was accompanied by "a scaling down of the regular population." The perception of suburban officials and people was that they were inheriting the city problems rather than viewing poverty and the effect on children as a regional and state issue. (McDermott, 29-30) By 1998, Minneapolis schools were 70% minority as compared with 2%, 7%, 10% and 4% in the suburbs (Hawkins, 2000, 3). One Minneapolis parent sent her kids to a school with 93% poverty rate, 98% minority, and that lived up to only 17% of the district performance criteria. Had she lived just a few miles away, the school was around half minority with a 32% poverty rate and met 83% of district performance marks. (Hawkins, 4) Educational access is linked to residence in the United States (Courtney, 1997, 6). Public perception associates urban schools with problems of discipline, drugs, and insufficient resources. Suburban schools are associated with advantage and a desire to flee urban problems (Courtney, 33). Examine the words of Samantha from Jonathan Kozol's *Savage Inequalities* (1991):

> "My mother wanted me to go to school there and she tried to have me transferred. It didn't work. The reason, she was told, is that we're in a different 'jurisdiction'. If you don't live up there in the hills, or further back, you can't attend their schools. That,

> at least, is what they told my mother." "Is that a matter of race?" I ask. "Or money?" "Well," she says. Choosing her words with care, "the two things, race and money, go so close together – what's the difference? I live here, they live there, and they don't want me in their school." (31)

Now even Blacks who are financially able are fleeing the cities. Parents perceive the problems of sending their children to schools with increasing poverty. Of course, this just means that a larger and increasing percent of the urban population is poor. (Reed, 2001, 42) Defenders of the status quo point to such movement as proof that in the United States, anyone can make it (Reed, 122; McDermott, 4). This ignores the use of law to impose separateness and unequal opportunity.

American government is a fragmented patchwork of government entities and subdivisions. Metropolitan areas are deeply fragmented with overlapping and competing autonomous units of governance. Legal mechanisms such as exclusionary zoning, restrictive building codes, minimum lot sizes, housing subsidies or lack thereof, banning apartment buildings, and similar devices helps maintain the "suburban environment" (Reed, 133; McDermott, 24). The result is racial and income homogenized suburbs where local control, home rule, and local autonomy are stressed as American ideals. People of the United States overwhelmingly support equal opportunity until such is applied to them locally in which case the desire for local control and hence, exclusion of others is much stronger. This fundamental collective action problem arises from the dual nature of education as a private and public good (McDermott, 22). We are willing to pay for a little for everyone but compete for more for us. To get the best for our own, we must exclude others. Those with political capital, the affluent and educated people of suburbia, are able to use the law as a tool of exclusion while claiming neutrality and universality (Reed, 134). They claim to be more deserving because they have proved the American dream while the cities are full of losers who spending more money on would be a waste (Reed, 154-55, 165). This localism transcends all factors in school finance including economic self interest (Reed 104-05). Communities become more insular and the rich and middle class remove themselves from responsibility for educating the poor (Reed, 128; McDermott, 25). Poverty is an urban problem (McDermott, 27). Local education monies stay local. These funds constitute nearly half and sometimes much more of school funds Courtney, 15-17; McDermott, 3). The connection between public education, property taxes, real estate values, and the stratification of communities is strong and creates networks of reinforcing interests which are readily mobilized when the status quo is threatened (Reed, 126). Walls require maintenance.

Applying Black's proposition that law decreases when people live in different worlds means that we would expect challenges to the status quo school

finance system to fail given the vast differences, whether real or perceived, that exist between the challenging have-nots and the challenged haves. This occurred at the federal level with *Rodriguez*. The picture on the state level is somewhat murky. While the current scorecard favors the challengers as discussed above, the real issue is what happened after the court decision which increased the amount of law. Little change is likely without court pressure (McDermott, 1999, 154). Reed studied eight states. Five states had court decisions striking down the finance scheme and three had decisions that affirmed the finance scheme. Reed concludes that court interaction, increasing the quantity of law according to Black, did increase the revenues available to most districts. The average decline in inequality among the five states was 29.38 percent. It is interesting to note that the range of expenditures per pupil has actually increased in the five states. In the three states affirming their system, inequality either stayed the same or became worse with an average increase in inequality of 9.2 percent. Oklahoma's range has expanded significantly since the court affirmed the system and inequality had increased 13.6 percent fives years after the court decision. (Reed, 2001, chapter 2) Often, poor districts may get more money, but structural changes do not occur (Reed, 87). In other words, the isolation and separation continues. Money alone does not provide equal opportunity in education. Certainly, without money opportunity is lessened. But going to school in homogeneous schools is inherently unequal. Separate is unequal (McDermott, 153). Reed suggests that courts have the most influence when the focus on their agenda-setting powers as opposed to micromanaging specific outcomes (Reed, 170). Certainly, keeping issues of moral, ethical, and ideological dimensions before the public is a useful process. It may be a matter of social control, but we must question whether it is law and also ask whether it is an admission of the weakness of law and courts in addressing the concerns of people of either perceived or actual different worlds. Only half the states have court decision requiring change and even when change is ordered, the issue of the quantity of law remains.

Some may wonder how the *Brown* case was decided the way it was considering the proposition above. The world of race in the early 1950's is arguably different that the world of wealth today. Races were separated, but often within cities and towns. They crossed paths. Linda Brown walked past the white school. Her parents shopped with white businesses. Today, affluent suburbs become walled enclaves, figuratively and often with actual walls. *Brown* does not necessarily refute the proposition. Law varies directly with intersocietal interaction (Black, 1976, 88)

Social Status and Relational Distance

A class action will always strengthen a case if all of the participants are at least equal to the original plaintiff in social status and if at least equally distant from the opposing side (Black, 1993, 30). The *Fair School* case out of Oklahoma

has an extensive list of plaintiffs, defendants, and intervenors. The lead plaintiff was the Fair School Finance Council which was created by forty school districts. The purpose was to equalize school funding in Oklahoma. The membership was a mix of the largest district in Oklahoma with suburban schools and even rural schools (Grossman, 1995, 528). Other plaintiffs were minors in the various school districts and individual taxpayers. The defendants included the State of Oklahoma, the governor, the state superintendent, the state board of education, and the state treasurer. The intervenors on behalf of the defendants included ninety or so school districts.

Under Black's proposition, the plaintiffs are at a disadvantage. Fair School Finance Council only has individuals on its side and most of them are minors. Assuming that Fair School Finance Council had a chance against the State of Oklahoma, individuals as plaintiffs are less than the association of school boards and districts included within FSFC. This may have been required legally, but adds nothing of power sociologically.

The addition of school district intervenors was an excellent strategy for defendants. This lessened the relational difference between the plaintiff side and the defendant side. The lead plaintiff was nothing more than an association of school districts. Law is inactive among intimates (Black, 1976, 41)**.** School districts can be seen as intimates in that they are associated together for various reasons and in many ways.

This is just analysis of one case. Future research may wish to consider this proposition and the examination of more cases. Of special interest would be the effect of the NAACP and other racial organizations as either parties or supporters in cases. This brings focus to another proposition of Professor Black.

Individuals v. Organizations

Unorganized people- individuals – win less than organizations (Black, 1993, 41-41). The lack of organization is one of the greatest disadvantages a person can experience in legal life. Many individuals are doubly disadvantaged: they are lone individuals facing organized adversaries and they are socially disabled (Black, 45-46). In *Fair School* we see primarily individuals against many organizations on the other side with the named individuals essentially representing the organization, perhaps the ultimate organization in American federalism, the state. As the Fair School Finance Council organization became less organized overtime, they accomplished less and eventually have left their second lawsuit filing dormant (Grossman, 1995, 521, 554-5). Organizational status of a group is determined by the degree of its organization (Black, 1976, 92). A similar phenomenon seemed to occur in the Minnesota cases with the NAACP as disputes arose over the direction of litigation within the organization. Eventually, the cases were settled, but many felt for very little value (Hawkins, 2000, article). Professor Black speaks of persons

doubly disadvantaged, but the intersection of poverty, race, and individualism creates a triple disadvantage for some.

Stratification and the Direction/Type of Law

Many people rail against "all these lawsuits" or the "litigation explosion." Professor Black helps us understand what is occurring. Stratification refers to inequality in wealth. Law varies directly with stratification. The more stratification a society has, the more law it has. (Black 1976, 11-13) In other words, law suits increase the less equal our nation becomes. Reed has demonstrated how the ranges of school expenditures increased even as overall inequality decreased in some states. Over the last twenty years, the top 5 percent of income earners in the United States have gone from 11 times the average income of the bottom 20 percent to 19 times. The richest 1 percent of households in the United States own 38 percent of all wealth in the United States. The Gini coefficient is at .82. (Multinational Monitor, May 2003) Reed used the Gini coefficient to measure inequality and indicates that zero is perfect equality and one perfect inequality (Reed, 2001, 26). Expect more lawsuits as inequality increases and the lack of political capital forces many to the law and courts. This is true even though Black proposes that law varies directly with rank. In other words, the poor are less litigious than the wealthy. As the numbers of poor grow, numbers of suits would be expected to increase. We may also expect to see more suits by the wealthy challenging taxes and plans that do try to remedy inequality. (Black, 1976, 16-18) Expect success in suits by the wealthy. Downward law is greater than upward law. Everything else constant, the wealthy beat the poor. The greater the stratification and rank distance, the greater is the downward law. Downward law varies directly with vertical distance in rank. (Black, 1976, 21- 25)

Black's propositions concerning the style of law are relevant in school finance cases. Stratification predicts and explains whether the law is penal, compensatory, therapeutic, or conciliatory. Downward law is more penal than upward law. Upward law is more compensatory than downward law. We see courts struggling with remedies when systems are struck down. There is reluctance to force, or penalize, those of high rank in their local elitist exclusionary enclaves. Mediations occur; various councils and groups meet, and sometimes the courts just get tired. We see one named case references with a growing list of roman numerals (e.g. Abbott II, III, IV etc.). We must wonder if such leniency would be shown the poor individual plaintiff if it had been determined that they violated the state constitution. Black provides a hypothesis.

New Matters for Researchers, Lawyers, and Others

Black provides more propositions in his sociological theory and model of law. Such is beyond the scope of this paper. Researchers can test the propositions against all of the school finance cases. This will help confirm or refute the

"science" of the sociology of law (Black, 1993, 3-4; 1976, ix). Anyone wishing to engage in school finance litigation should read and study the technical law, but much more. Black teaches us that we had better pay attention to the sociology of the case or sociological litigation. Who are the parties and supporters? Who are the judges and juries? Who are the witnesses? What is the relational distance between players? What is the rank of players? What is the strength of organization? Who are the lawyers? These are just a few of the questions that Black would suggest a true legal strategist to address.

Black's Reforms

When legal sociology of education cases enter the practice of law and its predictions become a guide to legal action, routinizing and marketing social differentials, sharpening and hardening discrimination, then law may itself be reformed. One proposal is to homogenize the social structure of the case by assigning them to organizations (legal co-ops). The organizations could be equalized so that the contest would be made fair. A second reform would be to homogenize the cases by reducing information about social characteristics. (Black, 1993, 97) Perhaps this is an example of what would be presented to judges:

> Case 1: Person B is school-aged. B lives close to an excellent public school, but must walk a much greater distance to another school with much fewer resources. This is required by the local public school district which is a subdivision of State K which maintains some schools for persons like B and excludes B from others. B would like to be able to go to her local school.
>
> Case 2: Person R is school aged. R attends school in a local public district which is a subdivision of State T. R's school has few resources and much less money to educate him despite the greater effort of taxpayers in R's district than in other public district schools which have great resources. R is excluded from the other schools by district lines created by the state, even though some schools may be close to R.
>
> The Law: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> The legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.

Would a case so framed need to differentiate between race and class? Would different standards of review be needed? What would the opinion say? Would B and R both win?

I contend that B and R would win. The opinion would not need to differentiate between race and class. The court could enforce the responsibility of the state to provide equal educational opportunity. Such would not necessarily weaken local control over other matters or to even have policy input on equality. Democratic local control of public education is a potent ideal; it is also a myth (McDermott, 1999, 7). What would be eliminated is unequal funding by the state and its subdivisions. Students would be allowed to attend any public school. When the state chooses to provide public education it shall do so for all on equal terms. This does not allow adequacy as a defense which is becoming the case in more and more cases and in public dialogue. Some get adequate; some get adequate plus much more. It all depends on where you live. This is not equal protection of the laws.

Some Final Thoughts: Localism/Money

When poor districts approach the legislature requesting more money and a fair share of the pie, the response is often that money isn't the answer. Interestingly in Oklahoma, the legislature has established a state school funded by the state and not local taxes which expresses clearly that the legislature does believe that money matters. The Oklahoma School of Science and Math serves high school students from around the state in a residential school campus. The State of Oklahoma cost of living adjusted per pupil spending is $4,481 and the unadjusted figure is $4,078 (Oklahoma Senate, 2004). The state created and financed Oklahoma School of Science and Math spent $23,209 per pupil in 1995. The amount spent directly on instruction was $12,812 per pupil. The school technically is open to any academically talented student. (Oklahoma School of Science and Mathematics web site) However, it seems that connections to the legislature, other branches of state government, and substantial corporate interest are most beneficial. The state minimum teacher salary in Oklahoma for a person with a Doctor's degree and no years of teaching experience is $29,272 and with 26 years of experience, $38,401 (State Department of Education, 2004). OSSM teachers earn a range of $36,667 to $62,000 (Greenwood, personal communication). The mean is $43, 412. The average for doctor degrees was $46,095. This was much higher for computer science teachers. The school has 40 instructors; 17 have doctorates (42.5%) and 19 have masters (47.5%). Requests for socio-economic data on students were ignored. The legislature should investigate. However, if the legislature is benefiting politically, then our democratic institutions are failing us. Money does matter to those who have it and it does matter when the

legislature decides to create an excellent school. Would they argue that OSSM could do the same on $4,000 per pupil? Ironically, this author drove by iron gates and wonderful campus of OSSM each morning on his was to an inner city school with few resources and children from the lowest ranks. I wondered why the beautiful children I taught deserved less.

Black specifically applied his propositions to the sociology of law. Perhaps they can also be applied to our educational practices. By honestly admitting that the rich, the connected, and the powerful get more educational benefit, perhaps we can explode the myth of education for all by locally controlled democratic institutions and real educational reform can occur.

Congressman Jesse Jackson Jr. has proposed the following amendment to the United States Constitution:

> Section 1. All citizens of the United States shall enjoy the right to a public education of equal high quality.
>
> Section 2. The Congress shall have power to implement this article by appropriate legislation.

For those opposing national involvement, it seems this could be modified for use in the states. This amendment at least raises the issue of whether education has national importance. Is education important to our national security? Is education a public good? Should we leave anyone behind? Or shall the equality and quality of our schools simply fall into a deep black hole?

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